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T.R., Appellant)	
)	
and)	Docket No. 20-1200
)	Issued: April 5, 2021
U.S. POSTAL SERVICE, SEMINOLE)	
PROCESSING & DISTRIBUTION CENTER,)	
Orlando, FL, Employer)	
)	

Case Submitted on the Record

Before:
 JANICE B. ASKIN, Judge
 PATRICIA H. FITZGERALD, Alternate Judge
 VALERIE D. EVANS-HARRELL, Alternate Judge

On May 25, 2020 appellant filed a timely appeal from January 9, February 24, and March 30, 2020 merit decisions of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.²

The issues are: (1) whether appellant has met his burden of proof to establish permanent impairment of a scheduled member or function of the body, warranting a schedule award; and

² The Board notes that, following the March 30, 2020 decision, OWCP received additional evidence. However, the Board’s *Rules of Procedure* provides: “The Board’s review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal.” 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

(2) whether OWCP abused its discretion in denying appellant's request for authorization for opioid medication.

FACTUAL HISTORY

On January 27, 2018 appellant, then a 53-year-old mail handler assistant, filed a traumatic injury claim (Form CA-1) alleging that on that date he suffered a right-sided, lower back injury when lifting a box while in the performance of duty. He initially stopped work on January 27, 2018. On April 19, 2018 OWCP accepted appellant's claim for lower back strain. It paid him wage-loss compensation on the supplemental rolls beginning March 19, 2018.

In a January 7, 2019 report, Dr. Richard Smith, a Board-certified orthopedic surgeon serving as a second opinion physician, noted that appellant was experiencing back and leg pain. He found that appellant was ambulating with no assistive devices and antalgic gait. Dr. Smith examined appellant's motor strength and diagnosed low back pain and lumbar sprain.

It later expanded its acceptance of the claim to include disc herniation at L4-5 and L5-S1.

Appellant stopped work on January 28, 2019. He returned to limited-duty work as a mail handler on April 12, 2019.

In a May 28, 2019 report, Dr. Mark Seldes, a Board-certified family practitioner, noted his review of appellant's medical history. He examined appellant and diagnosed lumbar radiculopathy with bilateral lower extremity involvement, L4-5 central canal stenosis with mild bilateral foraminal stenosis, and disc herniation at L5-S1 with an annular tear and central canal stenosis. Dr. Seldes opined that appellant had reached maximum medical improvement (MMI) on that day. He then utilized the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*)³ and *The Guides Newsletter, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition* (July/August 2009) (*The Guides Newsletter*) to calculate appellant's permanent impairment under the diagnosis-based impairment (DBI) rating method. Dr. Seldes identified the class of diagnosis (CDX) as a class 1 impairment for spinal nerve impairment. He assigned a grade modifier for functional history (GMFH) of 2 as appellant had a slight antalgic gait and intermittently used a cane. Dr. Seldes further found that a grade modifier for physical examination (GMPE) was not used. He reported a grade modifier for clinical studies (GMCS) of 2 as the nerve conduction velocity (NCV) and electromyography (EMG) tests showed evidence of lumbar radiculopathy with left S1 nerve root involvement. Dr. Seldes applied the net adjustment formula, resulting in a net adjustment of +2, which raised the default CDX grade value of C to E, corresponding to 4 percent permanent impairment of the lower extremity for severe sensory deficient and 10 percent permanent impairment for moderate motor deficit. He added the percentages for a total of 14 percent permanent impairment of the lower extremity due to S1 radiculopathy.

On August 19, 2019 appellant filed a claim for a schedule award (Form CA-7).

On September 18, 2019 OWCP referred appellant's case, along with a statement of accepted facts (SOAF), for a schedule award impairment rating with Dr. Michael Katz, a Board-

³ A.M.A., *Guides* (6th ed. 2009).

certified orthopedic surgeon serving as the district medical adviser (DMA). In a September 20, 2019 report, Dr. Katz reviewed the medical record and SOAF. He noted that Dr. Smith's January 7, 2019 report showed full motor function and no sensory deficits in the lower left extremity. Dr. Katz therefore found that there was a conflict of medical opinion with Dr. Seldes' May 28, 2019 report, which could not be resolved on the basis of a medical records' review. He recommended that OWCP obtain a second opinion impairment evaluation for the determination of spinal nerve impairment. Dr. Katz noted that a range of motion (ROM) rating was not applicable under the A.M.A., *Guides*.

On October 3, 2019 OWCP referred appellant for a second opinion examination with Dr. Brian Leung, a Board-certified orthopedic surgeon. In a November 1, 2019 report, Dr. Leung reviewed the medical record and SOAF. He examined appellant and found no sensory or motor deficit. Dr. Leung diagnosed lumbar disc herniation with radiculopathy and opined that appellant had not reached MMI. Utilizing the A.M.A., *Guides* and *The Guides Newsletter*, he placed appellant at class zero for spinal nerve impairment for sensory deficit and at class zero for spinal nerve impairment for motor deficit. Dr. Leung indicated that class zero corresponded to a zero percent permanent impairment rating for the left and right lower extremities.

In a November 13, 2019 report, Dr. Seldes noted that appellant experienced difficulty with any prolonged standing, sitting, reclining, ambulation, and climbing stairs. He examined appellant and found weakness in the extensor hallucis longus and ankle plantar flexors. Dr. Seldes further found decreased reflexes in the Achilles and bilateral medial hamstrings. He diagnosed lumbar radiculopathy with bilateral lower extremity involvement of the L5 and S1 nerve roots, L4-5 central canal stenosis with mild bilateral foraminal stenosis, and disc herniation at L5-S1 with annular tear and central canal stenosis.

In an authorization request form and certification/letter of medical necessity for opioid medications (Form CA-27), dated November 13, 2019, Dr. Seldes requested opioid medication for appellant's fascia muscle strain for 30 days.

In a letter dated November 14, 2019, OWCP authorized the request for opioid medication from November 13, 2019 through January 11, 2020. It advised that if opioid usage was anticipated to be necessary beyond the 60-day authorization period, a complete evaluation, including a rationalized explanation on the continued medical necessity of the opioid medication, was necessary. OWCP also provided a list of questions to be completed by the treating physician.

On December 23, 2019 OWCP referred the case back to DMA Dr. Katz for a schedule award impairment rating. In a January 2, 2020 report, Dr. Katz reviewed the SOAF and Dr. Leung's November 1, 2019 report. Utilizing the DBI method of the A.M.A., *Guides*, he identified the CDX as a class zero spinal nerve impairment for spinal nerves L3, L4, L5, and S1 for the right and left lower extremities. Dr. Katz indicated that there was no net adjustment and found a total of zero percent permanent impairment. He noted that the ROM methodology was not applicable and indicated that appellant reached MMI on November 1, 2019. Dr. Katz concurred with Dr. Leung's assessment of no motor or sensory deficits of the right and left lower extremities.

By decision dated January 9, 2020, OWCP denied appellant's schedule award claim, finding that the medical evidence of record was insufficient to establish permanent impairment of a scheduled member or function of the body.

OWCP subsequently received a magnetic resonance imaging (MRI) scan report of appellant's lumbar spine, dated February 27, 2018, which revealed disc herniation at L4-5 with mild bilateral foraminal stenosis and disc herniation at L5-S1 with annular tear with minimal central canal stenosis.

In an April 30, 2018 EMG/NCV study, findings revealed electrodiagnostic evidence consistent with lumbar radiculopathy affecting the left S1 nerve root.

In a letter dated January 27, 2020, Dr. Seldes noted that he disagreed with Dr. Leung's findings that appellant had no sensory or motor deficits. He indicated that appellant had daily radiculopathy in his lower extremities, which was clearly identified and consistent with diagnostic studies. Dr. Seldes recommended that appellant be sent to a referee examiner for evaluation and determination of his impairment rating.

In a February 5, 2020 report, Dr. Seldes noted that appellant had no issues with his current medications. He examined appellant and diagnosed lumbar radiculopathy with bilateral lower extremity involvement of the L5 and S1 nerve roots, L4-5 central canal stenosis with mild bilateral foraminal stenosis, and disc herniation at L5-S1 with annular tear and central canal stenosis. Dr. Seldes refilled appellant's opioid medication and found that he showed no signs of tolerance, withdrawal, or addiction to the use of opioid intermittent medication.

In a Form CA-27, dated February 5, 2020, Dr. Seldes requested opioid medication for appellant's lumbar radiculopathy for 30 days.

In a letter dated February 7, 2020, OWCP indicated that additional information was necessary before the request for opioid medication could be approved. It requested a complete response to its development letter, dated November 14, 2019. OWCP afforded appellant 14 days to submit the necessary evidence. No additional evidence was received.

On February 13, 2020 appellant requested reconsideration of the January 9, 2020 schedule award decision.

By decision dated February 24, 2020, OWCP denied appellant's request for authorization of the opioid medication, finding that the evidence of record did not support that it was medically necessary to treat the effects of his accepted employment-related conditions.

On March 17, 2020 OWCP again referred the case to DMA Dr. Katz for review of the newly submitted medical evidence. In a March 24, 2020 report, Dr. Katz reviewed the medical record and SOAF. He noted that the findings of the February 27, 2018 MRI scan and April 30, 2018 electrodiagnostic studies would not necessarily produce any motor or sensory deficits and were consistent with the physical findings of Drs. Leung and Smith. Dr. Katz opined that the concurrence of the two independent examiners, Drs. Leung and Smith, indicated that there were no findings of motor or sensory deficits in the lower extremities consistent with spinal nerve impairment. He therefore opined that his earlier opinion regarding impairment remained unchanged.

By decision dated March 30, 2020, OWCP denied modification of its January 9, 2020 decision denying appellant's schedule award claim. It accorded the weight of the medical evidence to the reports of Drs. Leung and Katz.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provisions of FECA,⁴ and its implementing federal regulations,⁵ set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss, or loss of use, of scheduled members or functions of the body. However, FECA does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law for all claimants, OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.⁶ As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.⁷

Neither FECA nor its implementing regulations provide for a schedule award for impairment to the back/spine or to the body as a whole.⁸ Furthermore, the back is specifically excluded from the definition of organ under FECA.⁹ The sixth edition of the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as impairments of the upper or lower extremities. Recognizing that FECA allows ratings for the extremities and precludes ratings for the spine, *The Guides Newsletter* offers an approach to rating spinal nerve impairments consistent with sixth edition methodology. For peripheral nerve impairments to the upper or lower extremities resulting from spinal injuries, OWCP's procedures indicate that *The Guides Newsletter* is to be applied.¹⁰ The Board has recognized the adoption of this methodology for rating extremity impairment as proper in order to provide a uniform standard applicable to each claimant for a schedule award for extremity impairment originating in the spine.¹¹

Section 8123(a) of FECA which provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, OWCP shall appoint a third physician (known as a referee physician or impartial medical specialist) who shall make an examination.¹² This is called a referee examination and OWCP will select a

⁴ 5 U.S.C. § 8107.

⁵ 20 C.F.R. § 10.404.

⁶ *Id.* at § 10.404(a).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(a) (February 2013); *see also* Chapter 3.700.2 and Exhibit 1 (January 2010).

⁸ *See P.B.*, Docket No. 20-0984 (issued November 25, 2020); *N.D.*, 59 ECAB 344 (2008); *Tania R. Keka*, 55 ECAB 354 (2004).

⁹ 5 U.S.C. § 8101(19); *S.G.*, Docket No. 19-1859 (issued August 20, 2020); *Francesco C. Veneziani*, 48 ECAB 572 (1997).

¹⁰ *Supra* note 7 at Chapter 3.700 (January 2010). *The Guides Newsletter* is included as Exhibit 4.

¹¹ *N.T.*, Docket No. 20-0667 (issued November 25, 2020); *E.D.*, Docket No. 13-2024 (issued April 24, 2014); *D.S.*, Docket No. 13-2011 (issued February 18, 2014).

¹² 5 U.S.C. § 8123(a); *L.S.*, Docket No. 19-1730 (issued August 26, 2020); *M.S.*, 58 ECAB 328 (2007).

physician who is qualified in the appropriate specialty and who has no prior connection with the case.¹³ When there exist opposing reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.¹⁴

ANALYSIS -- ISSUE 1

The Board finds that this case is not in posture for decision.

In support of his schedule award claim, appellant submitted a May 28, 2019 report from his attending physician, Dr. Seldes. Dr. Seldes indicated that appellant had reached MMI on May 28, 2019. He utilized the A.M.A., *Guides* and *The Guides Newsletter* to calculate appellant's permanent impairment under the DBI rating method. Dr. Seldes identified the CDX as a class 1 impairment for spinal nerve impairment. He assigned a GMFH of 2 as appellant had a slight antalgic gait and intermittently used a cane. Dr. Seldes found that a GMPE was not used. He reported a GMCS of 2 as diagnostic testing showed evidence of lumbar radiculopathy with left S1 nerve root involvement. Dr. Seldes calculated that appellant had a net adjustment of +2, resulting in 4 percent permanent impairment of the lower extremity for severe sensory deficient and 10 percent permanent impairment for moderate motor deficit. He combined the values for a total of 14 percent permanent impairment of the lower extremity.

In a September 20, 2019 report, DMA Dr. Katz recommended a second opinion impairment evaluation for the determination of spinal nerve impairment.

OWCP subsequently referred appellant to Dr. Leung for a second opinion evaluation. In a November 1, 2019 report, Dr. Leung reviewed the medical record and SOAF. He examined appellant and found no sensory or motor deficit. Utilizing the A.M.A., *Guides* and *The Guides Newsletter*, Dr. Leung identified the CDX as a class zero spinal nerve impairment for sensory deficit and a class zero spinal nerve impairment for motor deficit. He indicated that class zero corresponded to a zero percent permanent impairment rating for the left and right lower extremities.

In a January 2, 2020 report, DMA Dr. Katz indicated that he had reviewed Dr. Leung's November 1, 2019 permanent impairment rating report and concurred with his finding that appellant had zero percent permanent impairment of the lower extremities. By decision dated January 9, 2020, OWCP denied appellant's schedule award claim based on Dr. Katz' January 2, 2020 report.

The Board finds, however, that a conflict in medical opinion exists between the opinions of Dr. Seldes for appellant and Drs. Leung and Katz for the government. Each physician properly utilized the DBI methodology, but relied upon a different diagnosis classification for appellant's properly ratable condition. As set forth above, when there is disagreement between a DMA or other physician chosen by the government and appellant's physician, OWCP must appoint a third

¹³ 20 C.F.R. § 10.321; *see also* R.C., 58 ECAB 238 (2006).

¹⁴ P.B., *supra* note 8; Darlene R. Kennedy, 57 ECAB 414 (2006); Gloria J. Godfrey, 52 ECAB 486 (2001).

physician who shall make an examination.¹⁵ For a conflict to arise, the opposing physicians' opinions must be of virtually equal weight and rationale.¹⁶ The Board finds that the medical opinions of Dr. Seldes and Drs. Leung and Katz are of equal weight as they each present medical rationale for the choice of a proper diagnosis based on physical findings and diagnostic studies. The dispute between these physicians centers on the existence and extent of appellant's sensory or motor deficits on physical examination.

Because there remains an unresolved conflict in medical opinion regarding the extent of appellant's lower extremity permanent impairment, pursuant to 5 U.S.C. § 8123(a), the Board will remand the case to OWCP to refer him, along with the case record and SOAF, to a specialist in the appropriate field of medicine for an impartial medical examination to determine the extent and degree of his lower extremity permanent impairment in accordance with the sixth edition of the A.M.A., *Guides*. Following this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.

LEGAL PRECEDENT -- ISSUE 2

Section 8103(a) of FECA¹⁷ provides that the United States shall furnish to an employee who is injured while in the performance of duty, the services, appliances, and supplies prescribed or recommended by a qualified physician, which OWCP considers likely to cure, give relief, reduce the degree, or the period of disability, or aid in lessening the amount of monthly compensation.¹⁸ While OWCP is obligated to pay for treatment of employment-related conditions, the employee has the burden of proof to establish that the expenditure is incurred for treatment of the effects of an employment-related injury or condition.¹⁹

In interpreting section 8103(a), the Board has recognized that OWCP has broad discretion in approving services provided under section 8103, with the only limitation on OWCP's authority being that of reasonableness.²⁰ OWCP has the general objective of ensuring that an employee recovers from his or her injury to the fullest extent possible, in the shortest amount of time. It therefore has broad administrative discretion in choosing means to achieve this goal.²¹ In order to be entitled to reimbursement for medical expenses, a claimant must establish that the expenditures were incurred for treatment of the effects of an employment-related injury by submitting

¹⁵ *Supra* note 12.

¹⁶ *Supra* note 14; *see also* *H.B.*, Docket No. 19-0926 (issued September 10, 2020).

¹⁷ *Supra* note 1.

¹⁸ *Id.* at § 8103; *see D.K.*, Docket No. 20-0002 (issued August 25, 2020); *Thomas W. Stevens*, 50 ECAB 288 (1999).

¹⁹ *J.M.*, Docket No. 20-0457 (issued July 16, 2020); *Debra S. King*, 44 ECAB 203, 209 (1992).

²⁰ *B.I.*, Docket No. 18-0988 (issued March 13, 2020); *see also Daniel J. Perea*, 42 ECAB 214, 221 (1990) (holding that abuse of discretion by OWCP is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or administrative actions which are contrary to both logic, and probable deductions from established facts).

²¹ *D.S.*, Docket No. 18-0353 (issued May 18, 2020).

rationalized medical evidence that supports such a connection and demonstrates that the treatment is necessary and reasonable.²²

Abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from established facts. It is not enough to merely show that the evidence could be construed so as to produce a contrary factual conclusion.²³

ANALYSIS -- ISSUE 2

The Board finds that OWCP did not abuse its discretion by denying appellant's request for authorization for opioid medication.

In a November 13, 2019 Form CA-27, Dr. Seldes requested opioid medication for appellant's fascia muscle strain for 30 days.

On November 14, 2019 OWCP authorized the request for opioid medication and advised that if usage was anticipated to be necessary beyond the 60-day authorization period, a complete evaluation, including a rationalized explanation on the continued medical necessity of the opioid medication, was necessary. It provided a list of questions to be completed by the treating physician.

In a February 5, 2020 Form CA-27, Dr. Seldes again requested opioid medication for appellant's lumbar radiculopathy for 30 days. In an accompanying report, he examined appellant and diagnosed lumbar radiculopathy with bilateral lower extremity involvement of the L5 and S1 nerve roots, L4-5 central canal stenosis with mild bilateral foraminal stenosis, and disc herniation at L5-S1 with annular tear and central canal stenosis. Dr. Seldes refilled appellant's opioid medication and found that he showed no signs of tolerance, withdrawal, or addiction.

In a letter dated February 7, 2020, OWCP indicated that additional information was necessary before the request for opioid medication could be approved. It requested a complete response to its November 14, 2019 development letter and afforded 14 days to submit the necessary evidence. No additional evidence was received. By decision dated February 24, 2020, OWCP denied appellant's request for authorization of the opioid medication.

As noted, the only restriction on OWCP's authority to authorize medical treatment is one of reasonableness.²⁴ OWCP requested a rationalized explanation on the continued medical necessity of the opioid medication in its letters dated November 14, 2019 and February 7, 2020. While Dr. Seldes noted in his February 5, 2020 report that appellant showed no signs of tolerance, withdrawal, or addiction to the opioid medication, he failed to explain why it was medically

²² *D.K.*, *supra* note 18; *M.G.*, Docket No. 18-0099 (issued April 26, 2018).

²³ *P.L.*, Docket No. 20-0392 (issued October 28, 2020); *L.W.*, 59 ECAB 471 (2008); *Minnie B. Lewis*, 53 ECAB 606 (2002).

²⁴ *Supra* note 20.

necessary. The Board therefore finds that OWCP has not abused its discretion in denying appellant's request for authorization for opioid medication.²⁵

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that this case is not in posture for decision regarding appellant's lower extremity schedule award. The Board further finds that OWCP did not abuse its discretion by denying appellant's request for authorization for opioid medication.

ORDER

IT IS HEREBY ORDERED THAT the March 30 and January 9, 2020 decisions of the Office of Workers' Compensation Programs are set aside and the case is remanded for further proceedings consistent with this decision of the Board.

IT IS FURTHER ORDERED THAT the February 24, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 5, 2021
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

²⁵ See *G.B.*, Docket No. 18-1478 (issued February 4, 2019).